88-2057

Supreme Court, U.S.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1988

ALEXANDER G. HORNAK,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

WHERE PETITIONER'S ESTRANGED WIFE, AFTER DISCUSSING WITH GOVERNMENT AGENTS THE NATURE OF CERTAIN PERSONAL PAPERS OF THE PETITIONER KEPT BY HIM IN A LOCKED FILING CABINET IN HIS OFFICE AND THE FACT THAT SHE HAD ACCESS TO THEM, LATER ILLEGALLY SEIZED THOSE PERSONAL PAPERS AND GAVE THEM TO THE GOVERNMENT; WHETHER HER ACTS WERE ENCOURAGED BY THE GOVERNMENT AGENTS, THEREBY CONSTITUTING A VIOLATION OF THE PETITIONER'S FEDERAL CONSTITUTIONAL RIGHTS UNDER THE FOURTH AMENDMENT; AND WHETHER EVIDENCE ADDUCED FROM SUCH PAPERS, UPON WHICH A SUBSEQUENT SEARCH WARRANT WAS APPARENTLY BASED, SHOULD HAVE BEEN SUPPRESSED, ALONG WITH THE FURTHER EVIDENCE UNCOVERED BY EXECUTION OF THAT WARRANT?

PARTIES TO PROCEEDING

The parties to this proceeding are those indicated in the caption of this petition for a writ of certiorari, Alexander G. Hornak and The United States of America.

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

The petitioner, Alexander G. Hornak, prays that a writ of certiorari issue to review the judgment entry of the United States Court of Appeals for the Sixth Circuit, entered in this proceeding on 28 February 1989.

JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported. [See appendix B attached, P. 14, infra].

The judgment entries of the United States District Court for the Northern District of Ohio are unreported, and appear in appendix C, D, and E, p. 18, 20, and 22, infra.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on 28 February 1989. The judgment of the United States Court of Appeals for the Sixth Circuit denying rehearing was entered on 17 April 1989.

This petition for a writ of certiorari was filed within sixty (60) days of the latter date. The Court's jurisdiction is invoked under 28 U.S.C., Section 1254 (1).

CONSTITUTIONAL PROVISION

FOURTH AMENDMENT,
UNITED STATES CONSTITUTION:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On 7 April 1987, petitioner Hornak was charged by the Government in a nine-count information with willfully attempting to evade the payment of federal income taxes in violation of Title 26, Section 7201, United States Code. The first three counts concerned Hornak's and his wife's joint federal income tax liabilities for the calendar years 1980-1982; the second two counts referred to Hornak's individual liabilities for 1983 and 1984; and the last four counts involved the liabilities of Hi-Way Distributing Corporation of America (Hi-Way), of which Hornak is president, for the fiscal years ended 31 May 1981 through 31 May 1984.

The first three counts charged Hornak with causing a false and fraudulent joint individual income tax return, Form 1040, to be filed for himself and his wife for each of the three

years, which understated what he allegedly knew were the actual amounts of their joint income and joint income tax liability. The second two counts made the same charge regarding Hornak's individual income and income tax liability for each of the two years in question. The remaining four counts charged him, as President of Hi-Way, with having caused a false and fraudulent corporate income tax return, Form 1120, to be filed for each of the four years, which understated what he alledgedly knew to be the actual amounts of income and income tax liability of the corporation.

On 2 October 1987, Hornak filed a MOTION TO SUPPRESS EVIDENCE, pursuant to Federal Criminal Rule 12 (b) (3). In the motion, Hornak contended that the Government's informant, Charlene Wetzel, his estranged wife, was acting as a Government agent at the time she stole records belonging to him from a locked filing cabinet in his office on her last day of employment at Hornak's corporation, and turned them over to IRS agents. Hornak moved for the suppression of these illegally-seized documents themselves and of all fruits derived from them in terms of other documents and testimony, on the grounds that the use of such evidence against him at trial would constitute a violation of his Fourth Amendment rights under the Constitution of the United States against unlawful searches and seizures. On 9 October 1987, the Government filed a brief in opposition to Hornak's motion. The court held a hearing on the motion on 27 October 1987. Following the hearing, the court overruled the motion.

Jury trial commenced the following day, 28 October 1987, and continued for some six weeks. On 3 December 1987, jury verdicts were rendered, finding Hornak guilty on

all nine counts in the information against him. Judgment was entered by the court in accordance with the verdicts. On 9 March 1988, Hornak was sentenced to three years imprisonment on each of the nine counts, to run concurrently, and a fine of $5,000 on each count.

Hornak timely filed his notice of appeal on 11 March 1988. The judgment of the District Court was affirmed by the United States Court of Appeals for the Sixth Circuit on 28 February 1989. Hornak's petition for rehearing and rehearing en banc was denied on 17 April 1989. It is from that denial that this petition is taken.

REASON FOR GRANTING THE WRIT

The decision below fails to address the important and substantial question of when prior government contact with an informant, and discussion of the existence of papers and the informant's access to those papers by the informant and government agents, constitutes encouragement of the informant by the government agents, thus transforming otherwise private acts of the informant, in later illegally seizing those papers, into government acts, in violation of the Fourth Amendment.

Although the Fourth Amendment restrains only government action, both federal and state, there is no definitive test

for determining when a party may constitute government authority. Courts of appeals, in making this determination, have looked closely, on a case by case basis, at whether the party conducting the search may be considered an agent or instrument of the government. "Scope of the Fourth Amendment," 75 *Georgetown Law Review* 713 (1987), at 714-715.

The question presented here is mainly whether Charlene Wetzel, the petitioner's estranged wife, who had met with Government agents at her home on 9 August 1983, was acting as an agent of the Government when she took Hornak's personal and business records from his locked filing cabinet on 2 September 1983, without his consent, and provided them to the IRS on 7 September 1983.

The illegality of the taking is not itself at issue here. As this Court has firmly established in *Burdeau v. McDowell*, 256 U.S. 465 (1921), the Government may retain for use in a criminal trial even stolen documents, as long as they have been stolen by private individuals, without the participation or knowledge of any government official.

In line with that decision, this Court, in *United States v. Jacobsen*, 466 U.S. 109 (1984), determined that a private search by a freight carrier of a damaged package, even though followed by governmental involvement due to the discovery of illegal drugs therein, was not an act by the Government, since there was no governmental involvement prior to the search.

Following the same rule, the United States Court of Appeals for the Sixth Circuit found in *United States v. Coleman*, 628 F. 2d 961 (6 Cir. 1980) that the finding of a shotgun in a truck by a private individual who was repossessing a truck pursuant to the Michigan "self-help" statute was not

a [state] governmental action simply because the private individual was acting pursuant to that law. That court found that only a law which compels a private individual to act [rather than allowing him to act] could so convert that private party into an agent of the state.

Once again, in *United States v. Lambert*, 771 F. 2d 83 (6 Cir. 1985), the same court determined that the actions of a housekeeper who brought items from a defendant's home to the FBI was not governmental action, since the fruits of a purely private search were voluntarily relinquished to the Government. *Lambert* can be distinguished from this case, however, in that the housekeeper in *Lambert*, who did have antecedent contact with the FBI, testified that the FBI had never discussed with her the actual item which she later seized, and never told her that such item would be helpful to them. In the case at hand though, Charlene Wetzel did discuss with the Government agents the precise files to which she had access, before she seized them, and was told that they would be helpful.

In *Lambert*, following *Coleman, supra*, the Sixth Circuit Court of Appeals set up a two-fold test by which to measure whether a private person may be found to be acting as a governmental agent. First, the governmental authorities must have instigated, encouraged, or participated in the search. Secondly, the individual must have engaged in the search with the intent of assisting the governmental authorities in their investigative effort.

The record of this case shows that Wetzel, just like the housekeeper in *Lambert*, had the requisite motivation to fulfill the second part of the test. As to the first part of the test, it was never alleged by the petitioner that the Government either

instigated or participated in Wetzel's search of Hornak's office. It was alleged, however, that the Government encouraged her behavior.

This question of encouragement is not addressed in the decision of the Sixth Circuit Court of Appeals in this case, and is the reason why the petition for a writ of certiorari should be granted. Although the Court of Appeals cites *Lambert* as the chief basis for its opinion, it does not take up the question of how government "encouragement" is to be interpreted in making use of the test enunciated there. The failure to address that issue also leaves open the question of how prior government discussions with an informant about certain evidence, which is later seized by that informant, might give rise to a conversion of a private act into a government act; and the question of how government is to be deterred from making use of private citizens to conduct unconstitutional searches and seizures on its behalf. After all, going hand-in-hand with the Fourth Amendment is the judicially-created exclusionary rule.[1] The rule serves two distinct purposes: (1) preserving the integrity of the judicial system, and (2) deterring official misconduct. In Fourth Amendment cases such as this one, the rule is invoked to deter illegal searches and seizures by governmental authorities. *Georgetown Law Review, supra*, at 845-846.

The question of "encouragement" by government agents is directly addressed by this Court in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), upon which the Court of Appeals also bases its decision in this case. Although

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[1]The exclusionary rule, of course, also relates to a defendant's Fifth Amendment (self-incrimination) and Sixth Amendment (witness identification without counsel) rights.

not finding it to be present in that case, this Court recognized in *Coolidge, supra,* at 489, that a private citizen's actions could be directed "by the more subtle techniques of suggestion that are available to officials in circumstances like these." Recognizing that same point, Hornak maintains that the simple recitation of some "boilerplate" admonition not to do anything illegal, especially when delivered in the context of the 9 August 1983 meeting, does not offset the very "encouraging" atmosphere which the agents obviously provided for Wetzel to seize Hornak's records.

Recently, in *Murray v. United States*, 487 U.S ___, 101 L. Ed 2d 472 (1988), this Court remanded to the district court for hearing and determination the issue of whether a warrant-authorized search of a warehouse was an independent source of the information and tangible evidence used at trial against the defendant. This would not have been the case, reasoned the Court, if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant.

Hornak argues that, if Wetzel had been acting under the encouragement of the Government when she seized the 2 September 1983 documents, then all of the information and tangible evidence used by the Government against him is tainted by constitutional infirmity and should have been suppressed. Only if, as in *Murray, supra*, the Government can demonstrate that its later acquisition of the information and tangible evidence against Hornak was <u>not</u> the result of the earlier illegal entry by Wetzel can the independent source doctrine apply.

Long ago, in *Boyd v. United States*, 116 U.S. 616 (1886), this Court considered a case which involved the seizing of a man's personal papers to be used as evidence against him in a criminal proceeding. The Court found the governmental action at issue to violate both the Fourth and Fifth Amendment rights of the defendant. In so doing, it issued a warning concerning the gradual eroding of constitutional rights:

> ...[I]llegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to a gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. *Boyd, supra*, at 636.

Over one hundred years later, in his dissenting opinion in *Murray, supra*, at 489, Justice Stevens, quoting from the Court's decision in *Weeks v. United States*, 232 U.S. 383 (1914), reminded us that

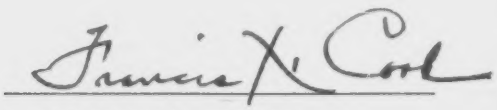
> the efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not

to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,



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APPENDIX A.

NO. 88-3234
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALEXANDER G. HORNAK,

Defendant-Appellant.

ORDER

(Filed April 17, 1989)

BEFORE: ENGEL, Chief Judge; KRUPANSKY and BOGGS, Circuit Judges.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

APPENDIX B.

NO. 88-3234
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALEXANDER G. HORNAK,

Defendant-Appellant.

On Appeal from the United States District Court
of the Northern District of Ohio

(Filed February 28, 1989)

BEFORE: ENGEL, Chief Judge; KRUPANSKY and
BOGGS, Circuit Judges.

PER CURIAM. Alexander Hornak appeals his conviction in the United States District Court for the Northern District of Ohio of willful evasion of income tax in violation of 28 U.S.C. § 7201.

Hornak was the principal owner of Hi-Way Distributing Corporation of America. Charlene Wetzel maintained the records for the corporation and was married to Hornak from 1978 to 1983. On August 8, 1983 Wetzel notified the Internal Revenue Service (IRS) regarding tax evasion by both Hornak and the corporation. She met with IRS agents and told them information regarding Hornak's and the corporation's tax reporting and gave them some pertinent documents.

On September 7, 1983, Wetzel again met with the IRS agents and more fully described Hornak's activities and gave the agents certain documents which she had removed from Hornak's office since her first meeting with the agents. On December 7, 1984, the IRS agents executed a search warrant at Hornak's office relying in large part on the information from Wetzel to show probable cause. Subsequently, Hornak was charged in a nine-count information for willful evasion of income tax in violation of 26 U.S.C. § 7201. A jury unanimously found Hornak guilty on all nine counts and he was sentenced to three years in prison, and fined $45,000. Hornak appeals.

On appeal, Hornak claims that the district court erred in not suppressing the evidence seized from his office by Charlene Wetzel because following her first meeting with the IRS agents she became an agent of the government and therefore such seizure without a warrant violated the fourth amendment. He further contends that the evidence seized by the IRS

agents using the search warrant should also have been suppressed because the underlying warrant was based on the illegal evidence obtained by Wetzel.

After careful consideration of the briefs and records on appeal, it is evident that affirmance is mandated by our circuit's decision in United States v. Lambert, 771 F.2d 83 (6th Cir. 1985). The conduct of Charlene Wetzel here is not unlike that of the housekeeper, Diana Hall, in Lambert and, if anything, involved considerably less contact with investigative authorities. In Lambert, Hall had not only accepted some expense money from the FBI in return for her continued surveillance of Lambert's activities, but had contacted the FBI approximately 25 times over the following year concerning those activities. Notwithstanding this involvement, our court held that her search was a private search and not within the Fourth Amendment: "The defendants insist that the items taken by Diana Hall from Lambert's house and delivered to the FBI violated their Fourth Amendment rights and should, therefore, have been suppressed. Initially, we note that the Fourth Amendment proscribes only governmental action and does not apply to a search or seizure, even an unreasonable one, conducted by a private individual not acting as an agent of the government or with the participation or knowlege of any governmental official." Id. at 89 (citing United States v. Jacobson, 466 U.S. 109 (1984); Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971)).

The district court's evidentiary rulings must be upheld unless they are clearly erroneous. United States v. Coleman, 628 F.2d 961, 963 (6th Cir. 1980). It is evident from the record here that Charlene Wetzel's original private searches were made without any police involvement, and they were the

result of her own personal actions. It is also evident that the second search after she had left her employment was also upon her own initiative, and, although perhaps a trespass as to the defendant, did not have approval and was in fact against the express directions of the federal agents to whom she had been communicating. Thus, even if illegal, her actions did not, as we held in Lambert, come within the purview of the Fourth Amendment and render the evidence seized by the agent subject to suppression. Accordingly, the judgment of the district court is AFFIRMED.

APPENDIX C.

CASE NO. 87-70A
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

vs.

ALEXANDER G. HORNAK,

Defendant

MOTION TO SUPPRESS EVIDENCE

(Filed October 2, 1987)

JUDGE KRENZLER

Now comes the defendant, Alexander G. Hornak, by and through counsel, and moves this Court, pursuant to Rule 12(b) (3) of the Federal Rules of Criminal Procedure, for an order suppressing any and all documents, as well as any additional documentary or testimonial evidence obtained as a result of such documents, which were provided by Charlene Wetzel after her initial contact with the government on or about August 9, 1983. The taking of these records violated the defendant's rights guaranteed by the Fourth Amendment to the United States Constitution.

The defendant respectfully contends that his guarantee to be secure against unreasonable search and seizures was violated when Ms. Wetzel, who had become a de facto agent of the government, stole personal and corporate records belonging to defendant. Thus, all such records and the fruits derived therefrom are the product of an unlawful search and seizure by a government agent.

[Only the first page of the motion has been included so that the following marginal entry in the Judge's handwriting could be shown: "Motion to Suppress Evidence Overruled Judge A.I. Krenzler 10-28-87".]

APPENDIX D.

CASE NO. 87-70A
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA

Plaintiff

-vs-

ALEXANDER G. HORNAK
Defendant

JUDGMENT OF GUILTY AS TO
ALL NINE COUNTS IN INFORMATION

(Filed December 3, 1987)

JUDGE ALVIN I. KRENZLER

The defendant, Alexander G. Hornak, was charged in a nine-count information, with each count alleging a separate violation of 26 U.S.C. § 7201 (willful evasion of income tax). This matter came on for trial on October 27, 1987.

On December 3, 1987, the jury returned its verdicts. The jury unanimously found the defendant, Alexander G. Hornak, guilty by proof beyond a reasonable doubt of all nine counts of the information. The jury was polled and each juror verified his or her verdict of guilty as to all nine counts.

The Court continued the matter for sentencing pending the preparation of a presentence report by the Federal Probation Department. As required by 18 U.S.C. § 1343 (a), the Court makes the explicit finding that the defendant is not likely to flee or pose a danger to society if released pending sentencing. Accordingly, the Court continued defendant's bond at $5,000.00, personal.

In accordance with the foregoing, the Court hereby enters a judgment of guilty against the defendant, Alexander G. Hornak, as to all nine counts of the information.

IT IS SO ORDERED.

(A. I. Krenzler)
UNITED STATES DISTRICT JUDGE

APPENDIX E.

CASE NO. 87-70A
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA

Plaintiff

-vs-

ALEXANDER G. HORNAK
Defendant

AMENDED JUDGMENT OF CONVICTION AND
SENTENCING ORDER

(Filed March 14, 1988)

JUDGE ALVIN I. KRENZLER

This matter came on for sentencing on March 4, 1988. The defendant, Alexander G. Hornak, was charged in a nine-count information filed April 7, 1987, for violation of 28 U.S.C. § 7201 (willful evasion of income tax). At the arraignment the Court accepted a plea of not guilty to the charges against the defendant and set the matter for trial.

This matter came on for trial on October 27, 1987. The jury returned its verdicts on December 3, 1987, and unanimously found the defendant, Alexander G. Hornak, guilty beyond a reasonable doubt of all nine counts of the information.

The Court then continued the matter for sentencing pending the preparation and receipt of a presentence report from the Federal Probation Department.

At the sentencing, the defendant was present and was represented by retained counsel, Mitchell Ehrenberg, Esq. Representing the government was John M. Siegel, Assistant United States Attorney.

Counsel for the defendant informed the Court that he had reviewed the presentence report with the defendant. The Court then provided counsel for the defendant and the defendant himself with the opportunity to make a statement in the defendant's behalf and to present any information in mitigation of punishment. Counsel for the government was given an equivalent opportunity to address the Court.

The Court then committed the defendant to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a term of three (3) years as to each count in the information, sentences to run concurrently. The Court further imposed a $5,000.00 fine as to each count of

the information for a total fine of $45,000.00. The defendant was also ordered to pay a special assessment of $50.00 into the Crime Victim's Fund, as required by 18 U.S.C. § 3013, on Counts V and IX for a total assessment of $100.00. After imposing sentence, the Court advised the defendant of the defendant's right to appeal in accordance with Fed R. Crim. P. 32 (a) (2).

Accordingly, the Court enters a judgment of conviction against the defendant, Alexander G. Hornak, for violations of 28 U.S.C. § 7201 (willful evasion of income tax).

The Court, finding that the defendant is not likely to flee or pose a danger to the safety of any person or the community, continued bond at $5,000.00, personal, pending the execution of his sentence. The defendant is ordered to voluntarily surrender to the United States Marshal's Service on or before April 6, 1988.

IT IS SO ORDERED.

(A. I. Krenzler)
UNITED STATES DISTRICT JUDGE